JOSÉ A. CABRANES, *Circuit Judge*, joined by Judges JACOBS, RAGGI, and LIVINGSTON, concurring in the denial of rehearing en banc:

Judge Pooler's dissent from the denial of rehearing en banc calls to mind the insight of our esteemed late colleague, Judge Frank X. Altimari: "if attorneys want to know what the law is not, then they should read the dissent."[1] Indeed, Judge Pooler herself takes the view that her dissent is an "oddit[y]" that "has as much force of law as if [her] views were published in a letter to the editor of [her] favorite local newspaper."[2]

Both sides of the Alien Tort Statute ("ATS")[3] corporate-liability debate were fully explicated in *Kiobel I*, and that debate need not be rehashed here.[4] Accordingly, I write only to correct two of the misconceptions in Judge Pooler's dissent.

First, there is Judge Pooler's untenable suggestion that "*Kiobel II* strongly suggests that corporate liability *does* exist under the ATS,"[5] which echoes the panel's position that "*Kiobel II* . . . cast[s] a shadow on *Kiobel I* in several ways."[6]

---

[1] Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 284 (1993); *see also Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1188 (10th Cir. 2014) ("This is one of those instances in which the dissent clearly tells us what the law is not. It is not as if the proposition had not occurred to the majority of the Court.").

[2] *United States v. Stewart*, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J., concurring in the denial of rehearing en banc).

[3] 28 U.S.C. § 1350.

[4] *See generally Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), *aff'd on other grounds*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"); *Kiobel I*, 631 F.3d at 149–96 (Leval, J., concurring only in the judgment). Notably, the *Kiobel I* panel's three judges agreed that, "for a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses." *Kiobel I*, 621 F.3d at 188 (Leval, J., concurring only in the judgment).

[5] Pooler, J., op. at 10 (emphasis in original).

Reading tea leaves, Judge Pooler and the panel divine significance from a single sentence in the Chief Justice's opinion for the Court: "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[7] According to Judge Pooler, this line "would be utterly incomprehensible to include if the Court also believed corporations were *categorically* immune from suit under the ATS."[8] The panel agrees: "if corporate liability under the ATS were not possible as a general matter, the Supreme Court's statement about 'mere corporate presence' would seem meaningless."[9]

Clearly not so. The Court's statement "would be utterly incomprehensible" and "seem meaningless" only if one were to ignore the entire context in which it was written. *Kiobel II* was a case in which the Court *explicitly* declined to address the corporate-liability question, and focused instead on extraterritoriality.[10]

In other words, for the purposes of its decision, the Court *assumed* that corporations could be held liable under the ATS. In light of this assumption, how could the Court possibly have discussed extraterritoriality without referring to "corporate presence"? The defendants were, after all, corporations. And corporations are "present" in a country in a completely different sense than are individuals.[11] In short, Judge Pooler and the panel are only half right. The implication of the Court's statement is indeed "that corporate presence may, in

---

[6] *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015), *as amended* (Dec. 17, 2015).

[7] *Kiobel II*, 133 S. Ct. at 1669.

[8] Pooler, J., op. at 10 (emphasis in original).

[9] *In re Arab Bank*, 808 F.3d at 155.

[10] *See Kiobel II*, 133 S. Ct. at 1663 ("We . . . now affirm the judgment below, based on our answer to the second question.").

[11] *Cf. Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977) ("The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes . . . [personal] jurisdiction over one type of defendant but not over the other.").

combination with some factual allegations, be sufficient"[12]—but sufficient only "to displace the presumption against extraterritorial application,"[13] not to establish liability.

Second, Judge Pooler argues that "the factual premise of the majority opinion in *Kiobel I* is incorrect," because "[v]iolations of the law of nations have been brought against juridical entities, including against ships, throughout history in both domestic and international tribunals."[14] The primary authority that Judge Pooler cites for this sweeping characterization of the historical record is *The Malek Adhel*, an 1844 decision of the Supreme Court that involved an *in rem* action against the eponymous ship brought pursuant to a federal statute codifying an offense against the law of nations—namely, piracy.[15]

But Judge Pooler's analogy between an *in rem* action against a ship and an *in personam* action against a corporation is inapt. As the Supreme Court has explained, a ship is named as a defendant in an *in rem* action only "under an ancient admiralty *fiction*," by which the ship is merely "*assumed* to be a person for the purpose of filing a lawsuit and enforcing a judgment," and "treated *as if* endowed with personality."[16] Thus, "[t]he concept of the ship as a distinct juridical entity" is no more than "a convenient conceptual tool."[17]

---

[12] *Arab Bank*, 808 F.3d at 155.

[13] *Kiobel II*, 133 S. Ct. at 1669.

[14] Pooler, J., op. at 8 (alterations omitted).

[15] 43 U.S. 210, 229 (1844) (describing the initiation of the action "upon an information *in rem*, upon a seizure brought for a supposed violation of the act of the 3d of March, 1819, . . . to punish the crime of piracy"). The Constitution empowers Congress to "define and punish . . . [o]ffenses against the [l]aw of [n]ations" such as piracy. *See* U.S. Const. art. I, § 8, cl. 10.

[16] *Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 22–23 & n.1 (1960) (emphases supplied) (internal quotation marks omitted) (quoting Oliver Wendell Holmes, Jr., *The Common Law* 26–27 (1881)); *see also Chase Manhattan Fin. Servs., Inc. v. McMillian*, 896 F.2d 452, 456–57 (10th Cir. 1990) (describing the notion "that the ship itself is the 'person' who committed the offense and is legally responsible for the consequences" as a "fiction"); *Ins. Co. of N. Am. v. S/S Am. Argosy*, 732 F.2d 299, 302 (2d Cir. 1984) ("The *in rem* liability of a ship is a fiction . . . .").

[17] *Smith v. The Mormacdale*, 198 F.2d 849, 850 (3d Cir. 1952).

In this respect, ships are no different from other inanimate objects, against which *in rem* actions have been brought regularly since the Founding under federal statutes prohibiting piracy, slavery, and other law-of-nations offenses. Following Judge Pooler's analogy to its logical conclusion, these cases must stand for the proposition that sealskins,[18] 1998 Mercury Sables,[19] houses,[20] and bronze rods[21] are equally capable of violating international law.

By contrast to an *in rem* action against a ship, an *in personam* action against a corporation need not rely on any such fiction. This is because, unlike a ship, a corporation is truly "distinct from" its "corporate owner/employee," and is "a legally different entity with different rights and responsibilities due to its different legal status."[22] A corporation has, "necessarily and inseparably incident to" its very existence, "the ability to sue or be sued."[23] Accordingly, an action against a corporation is exactly that—an action against the corporation. *Pace* Judge Pooler, there is a difference between fact and fiction.

---

[18] *See Davison v. Seal-Skins*, 7 F. Cas. 192, 192–93 (C.C.D. Conn. 1835) (holding that "sealskins . . . saved and rescued from . . . piratical capture" could be salvaged through *in rem* action against them).

[19] *See United States v. One 1998 Mercury Sable*, 122 F. App'x 760, 761 (5th Cir. 2004) (unpublished opinion) (holding that 1998 Mercury Sable, as part of proceeds from peonage, was subject to forfeiture).

[20] *See United States v. Sabhnani*, 599 F.3d 215, 260–63 (2d Cir. 2010) (permitting forfeiture of house used to facilitate involuntary servitude).

[21] *See Martin v. One Bronze Rod*, 581 F. App'x 744, 750 (11th Cir. 2014) (unpublished opinion) (assuming without deciding that forfeiture of bronze rod connected to "piratical activity" was authorized).

[22] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001); *see also Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988) ("A corporation is an entity that is created by law and endowed with a separate and distinct existence from that of its owners. Because a principal purpose for organizing a corporation is to permit its owners to limit their liability, there is a presumption of separateness between a corporation and its owners, which is entitled to substantial weight." (citation omitted)).

[23] *Cook Cty., Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 126–27 (2003) (alterations and internal quotation marks omitted).

For these reasons—and for the reasons forcefully stated by Judge Jacobs in his separate concurrence, which I join in its entirety—I concur in the denial of rehearing en banc.